Supreme Court, U.S.
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No. 93-1548

In The

Supreme Court of the United States

October Term, 1993

DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as Next Best Friend of Domiauant Johnson, a Minor,

Petitioner,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court properly granted summary judgment to Defendant Methodist on the claims of the Second Amended Complaint, not considering evidence on claims in the proposed Third Amended Complaint (which the Court had denied leave to file).

2. Whether the District Court abused its discretion in denying Plaintiff's Motion for Leave to file a Third Amended Complaint made 10 years after the incident in question and 4 years after suit had initially been filed, when Plaintiff has given no explanation for the delay, the proposed Complaint asserted 21 new theories of liability, and additional and repeat discovery would be required.

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DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as Next Best Friend of Domiauant Johnson, a Minor,

Petitioner,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Methodist Medical Center of Illinois respectfully requests this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Respondent seeks affirmance of the District Court's Order denying Petitioner leave to file a Third Amended Complaint, and granting summary judgment on the allegations of the Second Amended Complaint.

In her Petition for Certiorari, Plaintiff-Petitioner urges review of a District Court Decision which first denied Plaintiff leave to file a Third Amended Complaint and then granted a Motion for Summary Judgment on

Plaintiff's Second Amended Complaint. The Circuit Court of Appeals unanimously affirmed. As described herein, certiorari should be denied in this case because:

1. The Court of Appeals correctly recognized that denying leave to file a Third Amended Complaint was a matter confided to the discretion of the District Court, and Plaintiff's unexplained and lengthy delay is a proper basis under traditional principles for denying such a motion;

2. When Plaintiff now argues that the delay was due to Defendant hospital, Plaintiff is making an argument not presented to the District Court, and under traditional principles of appellate procedure such an argument should not be considered at all;

3. In the two Courts below Plaintiff did not seriously contest Defendant hospital's Motion for Summary Judgment on the allegations of malpractice contained in the Second Amended Complaint;

4. Under traditional principles, neither the District Court nor the Circuit Court of Appeals are obliged to consider new claims raised for the first time in response to a Motion for Summary Judgment which are not contained in the pleadings;

5. The Circuit Court of Appeals' Decision is not in conflict with any Decision of this Court or any other Court of Appeals; and

6. The Court of Appeals' Decision was correct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 11, F.R.Civ.P. Signing of Pleadings, Motions, and Other Papers, Sanctions.

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact* . . . (As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.) (emphasis added).

Rule 15, F.R.Civ.P. Amended and Supplemental Pleadings.

> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party;* . . . (Emphasis added.)

Rule 56, F.R.Civ.P. Summary Judgment

> **(c) Motion and Proceedings Thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. . . .

§ 71, Ch. 51, *Ill.Rev.Stat.* (1981)
(now 735 ILCS 5/8-2001)

Every private and public hospital shall, upon the demand (now "request") of any patient who has been treated in such hospital and after his discharge therefrom, permit the patient, his physician or authorized attorney to examine the hospital records. . . . and permit copies of such records to be made by him . . .

§ 2-622, Ch. 110, *Ill.Rev.Stat.* (1987)
(now 735 ILCS 5/2-622)

§ 2-622. Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other . . . , the plaintiff's attorney or the plaintiff . . . shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional . . . *that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved . . . that there is a reasonable and meritorious cause for the filing of such action;* and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action . . . A copy of the written report [of the health professional], clearly identifying the plaintiff and the reasons for the reviewing health professional's

> determination that a reasonable and meritorious cause for filing of the action exists, must be attached to [the attorney's] affidavit. . . . (emphasis added).

STATEMENT OF THE CASE

Plaintiff's daughter, Wanda Johnson, was hospitalized at Methodist Medical Center of Illinois from June 30 to August 24, 1982. She had entered the hospital at 3:00 a.m. on June 30 in labor, and a Caesarian section was performed by her obstetrician at 5:30 p.m. on that date. She developed an infection, which resulted in injury to her.

In August of 1982, copies of the hospital chart were procured by former attorneys for Plaintiff. On March 18, 1988, Plaintiff filed this medical malpractice action against the hospital and others, basically alleging that Drs. Thompson (obstetrician) and Doughty (internist) were agents of the hospital and the hospital was vicariously liable for their negligence.

On July 7, 1989, Plaintiff filed an Amended Complaint. This contained the same allegations of malpractice as the original Complaint, but added new charges of claimed malpractice of residents of other hospitals, Dr. O'Connor and the Infectious Disease Control Program. It was claimed that Dr. O'Connor (internist) and the unnamed residents of other hospitals were agents or servants of Defendant hospital. On August 7, 1989, Plaintiff filed a Second Amended Complaint, making no material changes as to the Defendant hospital.

Dr. Zatuchni's deposition was taken on August 23, 1991. In his deposition, this Plaintiff's expert acknowledged that most of the criticisms listed in the Answers to Interrogatories concerning him were in fact criticisms of the doctors rather than the hospital. He also stated that the many new claims of malpractice he articulated in his deposition, concerning such matters as the claimed failure of the hospital staff and the nurses to communicate, were not disclosed in those Answers to Interrogatories.

The deposition of the other Plaintiff's expert, Mr. Nellis, was taken on September 16, 1991. We were provided with a 10-page single-spaced outline of his opinions as we walked into the deposition room just minutes before the deposition began.

On November 27, 1991, Defendant hospital filed its Motion for Summary Judgment based on the allegations contained in the pending Second Amended Complaint. On January 13, 1992, Plaintiff moved for leave to file a Third Amended Complaint, asserting 21 new theories of liability against Defendant hospital. That Motion for Leave to File was denied by the District Court on April 3, 1992. Counsel for Plaintiff offered no reason for the delay in presenting the new theories. Calling the attempt to amend "unconscionable", the District Court denied the Motion for Leave to Amend, stating "[t]his case is going to have a beginning and a middle and an end just like every other case".

On June 26, 1992, the District Court granted Defendant hospital's Motion for Summary Judgment, noting that Plaintiff did not "seriously challenge" the specific arguments which had been made in support of the

Motion for Summary Judgment on the Second Amended Complaint. Pet. at A. 19.

The Circuit Court of Appeals held that the District Court did not abuse its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint, saying "[t]he proposed Complaint attempts to add a whole new theory of the case four years after this action was commenced, with no explanation as to why amendment did not take place sooner, except perhaps that Plaintiff's attorney felt it was not necessary". Pet. at A. 8. The Circuit Court affirmed the District Court's grant of summary judgment on the allegations of the Second Amended Complaint, saying that "Plaintiff did not address Methodist's showing on the issues raised by the Second Amended Complaint" that Plaintiff's claims "had no merit". Pet. at A. 9.

REASONS FOR DENYING THE WRIT

In general, the Petition should be denied because the case has been decided using traditional rule-based principles of both trial and appellate practice. There are no special or important reasons for granting certiorari.

I. The District Court properly exercised its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint made 10 years after the incident in question and 4 years after suit had initially been filed, when Plaintiff gave no explanation for the delay, the proposed Complaint asserted 21 new theories of liability, and additional and repeat discovery would be required.

It is axiomatic that a Motion for Leave to File an Amended Complaint is addressed to the sound discretion

of the District Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 28 L. Ed. 2d 77, 87 (1971). Having observed first hand a party's diligence or lack thereof, the trial judge is particularly well situated to determine the worthiness of a Motion to Amend. *Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir. 1990).

Reasons sufficient to deny leave to amend in the exercise of the District Court's discretion, are: 1) undue delay; 2) bad faith or dilatory motive of movant; 3) previous failure to cure deficiencies in the complaint; 4) undue prejudice to opponent; and 5) futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962). Any one of those reasons standing alone is sufficient to deny leave to amend, and all are present here.

First, the proposed Third Amended Complaint was offered 10 years after the incident in question and 4 years after suit was filed. This is undue delay. We must note that Illinois law does allow some pre-suit discovery by requiring that hospitals provide their patient's records to the patient's attorneys on demand even before suit is filed. § 71, Ch. 51, *Ill.Rev.Stat.* (1981) (now 735 ILCS 5/8-2001). Illinois substantive law requires that Plaintiff in a malpractice action have the hospital chart reviewed by an expert before suit is filed so as to certify that there is a reasonable and meritorious cause for filing such an action. § 2-622, Ch. 110, *Ill.Rev.Stat.* (1987) (now 735 ILCS 5/2-622). Also, Federal Rules provided that an attorney's signature on a complaint is to be a certificate that "to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact . . . ". *Rule 11, F.R.Civ.P.* (emphasis added). Here, the

hospital chart was provided to former attorneys for Plaintiff in August of 1982, six years before suit was filed. In short, applicable law requires that Plaintiff have experts review the hospital chart before suit is filed, not years after filing suit.

Second, it is Plaintiff's obligation to explain the reason for the delay. Here, Plaintiff has offered no explanation whatsoever. It is clear that "where . . . a considerable period of time has passed between the filing of the complaint and the motion to amend", the movant has the burden of showing "some 'valid reason for his neglect and delay' (citations omitted)". *Hayes v. New England Millwork Distributors, Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979) (and cases collected therein). There are unanswered questions here. Why was the hospital chart not properly reviewed by an obstetrician in the 6 years before suit was filed? Why was Dr. Zatuchni, the obstetrician acting as Plaintiff's expert, not contacted until 1990, 8 years after the occurrence and 2 years after suit was filed? When the expert interrogatories were answered in January of 1991, 3 years after suit was filed, why were the 21 new claims not then described? Why did Defendant hospital have to wait until the expert's deposition in August of 1991, 3½ years after suit was filed, to first learn of these 21 new claims of malpractice? Plaintiff has not answered these questions and offers no explanation for the delay in raising these 21 new claims.

Third, the proposed Third Amended Complaint was the last in a long series of fruitless efforts to make a claim against Defendant hospital. (1) The original Complaint of March 1988 had focused on the contention that Drs. Thompson and Doughty were employees of the hospital,

and that the hospital was therefore vicariously liable for their claimed malpractice. It was promptly learned through Answers to Interrogatories that this contention was untrue, and that Plaintiff did not even have witnesses or documentation to lend support to the claim of an agency relationship. (2) The Amended and Second Amended Complaints filed in the summer of 1989 restated the same contentions as before, and added the contentions that Dr. O'Connor and certain unnamed residents of other hospitals were guilty of malpractice and were likewise employees of the hospital. It was then demonstrated that this contention was likewise untrue. Those 1989 pleadings also contended that the hospital was negligent in the operation of its Infectious Disease Control Program, but the November 1990 deposition of Dr. Snydman, Plaintiff's expert on infectious diseases, established that even he was of the opinion that the Defendant hospital was not negligent in that regard. (3) In the November 1990 deposition of Dr. Snydman, it was claimed that Defendant hospital was guilty of malpractice for failure to report drug sensitivity of a particular culture. However, Defendant hospital later demonstrated that the decision to test or not to test for drug sensitivity was a decision not made by any agent of the hospital. (4) In January of 1991, Plaintiff answered interrogatories about the opinions of Dr. Zatuchni concerning hospital malpractice on such matters as pre-eclampsia, pelvic assessment during labor and other matters. However, in his deposition of August of 1991, it was determined that these new charges could not be supported. (5) It was then, in August of 1991, when we first began to learn of the 21 new theories of malpractice which Plaintiff later

wished to add in the Third Amended Complaint. To put it plainly, enough is enough. A Defendant should not have to endlessly battle whole new sets of charges of malpractice where the history of the litigation is one of new claims constantly defeated.

Fourth, had the Motion for Leave to File the Third Amended Complaint been granted, Defendant hospital would have been prejudiced. As mentioned, the previous pleadings had focused on the contention that various doctors and residents were employees of the hospital, a contention that proved to be false. The District Court correctly observed that these new claims were "very different" from the claims raised in the Second Amended Complaint, and "cannot fairly be said to arise out of" those previous claims. Pet. at A. 22-23. The Circuit Court correctly observed that the proposed Complaint "attempts to add a whole new theory of the case". Pet. at A. 8. Both Courts rightly concluded that Defendant hospital would have to be given the opportunity for new discovery concerning the new claims. *Id.*

After all, Defendant hospital did not learn any of the 21 new claims of malpractice of these two experts until the very days of their respective depositions, at what was supposed to be the end (not the beginning) of discovery of Plaintiff's case. These 21 new contentions later surfaced in the proposed Third Amended Complaint. It had not been previously contended that the labor and delivery room nurses were guilty of malpractice in any regard, but the new pleading would have stated 11 charges of misconduct by them. Pet. at A. 5. There had been no prior claims that the "hospital staff" was guilty of any malpractice, but the proposed Complaint charged the staff (without identifying any particular person) with 3 acts of

malpractice. Pet. at A. 5-6. We must note that the medical staff at that time included 257 physicians and the hospital had literally thousands of employees. There had been no prior claim of any malpractice by the hospital as an institution, but the proposed Complaint contained 7 charges against the institution. Pet. at A. 6. New and repeat discovery would have been required. The proposed Complaint would have alleged new and different misconduct (*e.g.* failure to communicate) by new and different persons (*e.g.* the labor and delivery room nurses) concerning new and different procedures or events (*e.g.* the rupture of the membranes).

In summary, the District Court has discretion to deny a Motion for Leave to Amend. Here, there was a 4 year delay in Plaintiff's presentation of 21 entirely new claims of malpractice, and Plaintiff offered no explanation whatsoever for the delay. Allowing injection of the 21 new theories into the case (when discovery was supposed to be ending, not beginning) would have required additional and repeat discovery. This was but the last in a long series of fruitless attempts to make out a claim against Defendant hospital. The District Court properly exercised its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint.

II. Plaintiff's claim that the delay was due to Defendant hospital was not raised before the District Court, and should not be considered by this Court.

Plaintiff's Petition argues that the delay in presenting her Third Amended Complaint was occasioned by Defendant hospital's Motions to Dismiss and a lackadaisical

attitude toward taking the depositions of Plaintiff's experts. Pet., p. 9. This contention was not raised before the District Court. It is fundamental that on appeal, a litigant is restricted to those arguments which have been raised at the District Court level. *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 837 (1976). Accordingly, this argument should not be considered on appeal to this Court.

There are important practical considerations behind this principle as it applies here. First, the issue of leave to file an amended pleading is confided to the District Court's sound discretion, and that Court is particularly well-suited to assess diligence or lack thereof having observed the case throughout its development. *Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir. 1990). Second, where such an argument is raised for the first time on appeal, the opponent of the argument is deprived of the opportunity to make a record by submitting such documents, affidavits or other materials as may be available to refute the argument.

In the present case, Plaintiff first argues that it was Defendant hospital's motion practice which delayed the disposition of the case. Pet., pp. 9-12. Plaintiff implies, but does not expressly claim, that discovery was at a halt while that motion practice proceeded. That implication is untrue. For example, written discovery began with interrogatories in May of 1988. Sixteen depositions were taken before the depositions of the experts at issue. Those depositions were: (1) Plaintiff (October 6, 1988); (2-6) Tamela Brown, Imogene Jackson, Helen Lewis, Diane Macklin and Stanley Macklin (* March 31, 1989); (7) Defendant Robert Thompson, M.D. (May 11, 1989); (8) Defendant

Steven Doughty, M.D. (May 23, 1989); (9) Defendant Richard O'Connor, M.D. (August 10, 1989); (10) Nelda Bevill, R.N. (* October 17, 1989); (11) resident Herbert Wiser, M.D. (January 8, 1990); (12) Plaintiff's expert Alan Spector (* October 23, 1990); (13) Plaintiff's expert Richard Snydman, M.D. (November 12, 1990); (14) Plaintiff's expert Russell Glantz, M.D. (* January 20, 1991); (15) Michael Veeder, M.D. (* May 15, 1991); and (16) John Taraska, M.D. (* May 28, 1991). In addition, Defendant hospital propounded 7 sets of Supplemental Interrogatories in an attempt to find out the nature of Plaintiff's claims of malpractice. As can be seen, discovery proceeded apace while the motion practice pursued its parallel course.

Plaintiff also argues that Defendant hospital unduly delayed 15 months in deposing expert Zatuchni and 7 months in deposing Mr. Nellis. Pet., pp. 9-12. Under a scheduling order adopted by the District Court, depositions of Plaintiff's experts were to be concluded by May 31, 1990. However, it was Plaintiff's late disclosure of two new experts (Dr. Zatuchni and Mr. Nellis) on May 14 and December 7, 1990, which forced an extension of discovery deadlines. Subsequently, a struggle ensued to secure answers to interrogatories listing the opinions of these experts before their depositions could be taken:

12/07/90 Nellis disclosed as expert in supplemental answer to interrogatories (7 months late);

12/20/90 Defendant hospital propounds Fourth Supplemental Interrogatories re: Mr. Nellis;

01/07/91 Plaintiff answers Third Supplemental Interrogatories re: Dr. Zatuchni (approximately 7 months late);

01/30/91 Notice for deposition of Mr. Nellis;

02/04/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

02/14/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

03/15/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

04/01/91 Defendant hospital files Motion to Compel re: Answers to Interrogatories on Mr. Nellis;

05/13/91 Joint motion to extend time based on impossibility of scheduling doctors' depositions;

05/16/91 Plaintiff answers Fourth Supplemental Interrogatories re: Mr. Nellis (3 months late);

06/28/91 Court grants Motion to Compel, Plaintiff to comply within 10 days;

* 07/15/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: compliance with 6/28 order and

requesting dates for Nellis and Zatuchni depositions;

07/29/91 Notice for deposition of Dr. Zatuchni;

* 08/16/91 Letter from Plaintiff's counsel; advises Nellis is available for deposition; on September 16, 1991;

08/23/91 Dr. Zatuchni deposition taken; and

09/16/91 Mr. Nellis deposition taken.

As can be readily seen, the delay of which Plaintiff speaks came about because of Plaintiff's failure to comply with discovery requests concerning these two expert witnesses.

In the last 2 paragraphs, the items marked with an asterisk (*) are not contained in the record. We did not file those letters and depositions with the District Court because Plaintiff did not make this argument before that Court. For the same reason, we did not make a record of the fact that Plaintiff wished the depositions of her experts delayed until such time as she completed depositions of other persons. We suggest these facts only to illustrate how an appellant or respondent can be prejudiced when an appellee or petitioner raises an argument not raised before the District Court.

It is fundamental that a court of review will not consider arguments not raised before the District Court, and this particular argument was not raised there. The two practical reasons for application of this principle here are that: (a) the District Court, having followed the case

throughout its history, is in the best position to judge who has been diligent and who has not been diligent; and (b) allowing such an argument to be raised for the first time on appeal deprives the opponent of the argument the opportunity to make of record facts which could counter the argument.

III. Summary judgment was properly granted on the allegations of malpractice in the Second Amended Complaint because there was no genuine issue as to certain material facts.

If the record taken as a whole could not lead a rational jury to find for the opponent of the motion, there is no genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986). Summary Judgment is to be granted where there is no genuine issue as to the material facts. Rule 56(c), *F.R.Civ.P.*

The first seven allegations of malpractice contained in the Second Amended Complaint were that Drs. Thompson, Doughty and O'Connor, as well as unnamed residents from other hospitals, committed malpractice, and that Defendant hospital was vicariously liable because they were agents of the hospital. The District Court found the agency argument to be meritless. The Court found persuasive the fact that the doctors were not employed by the hospital, not in any way paid by the hospital for the care of the patient, and billed separately for their services, among other reasons. Pet. at A. 17. Another allegation in the Second Amended Complaint was that the hospital was negligent in failing to perform a

pelvic capacity analysis on the patient. As noted by the District Court, Plaintiff's own expert testified that such an examination cannot be performed by hospital staff members such as nurses, but rather must be performed by an obstetrician. Pet. at A. 18. The Complaint further alleges that the hospital was negligent for failure to provide an internal pressure catheter. As found by the District Court, that contention was refuted by Plaintiff's own testimony. Pet. at A. 18-19. Finally, the Complaint asserted that the hospital was negligent for failure to identify the infectious disease contracted by Plaintiff's daughter. The District Court found that Plaintiff had not presented the required expert proof to support this claimed standard of care. Pet. at A. 19. The District Court correctly noted that Plaintiff "does not seriously challenge" the arguments made by Defendant hospital on these claims of malpractice. Pet. at A. 19.

In short, there is no genuine dispute of material fact as to the claims of malpractice alleged in the Second Amended Complaint. Rather than challenge Defendant's Motion for Summary Judgment by presenting opposing contentions of fact before the District Court, the Plaintiff elected to argue that claims not made in the Second Amended Complaint should be litigated, even after the District Court had denied leave to file the Third Amended Complaint containing those 21 new claims.

IV. When new claims of liability are raised for the first time in response to a Motion for Summary Judgment, and are not contained in the pleadings, they need not be considered by the Court.

When new claims of liability are raised for the first time in response to a Motion for Summary Judgment, and are not contained in the pleadings, they need not be considered by the Court. *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990); and *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991). In this case, Defendant hospital filed its Motion for Summary Judgment on November 27, 1991. Plaintiff then responded by moving on January 13, 1992, for leave to file her Third Amended Complaint asserting 21 new theories of malpractice.

It would be meaningless to say that a District Court has discretion to deny a motion for leave to amend if, thereafter, a party could freely assert every contention which it had been denied leave to make a part of its pleadings. Rule 15 provides that after a responsive pleading has been filed, a party may amend only by leave of court. Rule 15, *F.R.Civ.P.* This Court went to considerable trouble in *Foman* to lay down considerations such as undue delay which could properly guide a District Court in the exercise of that discretion. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962). This is a useless exercise if a party may assert in opposition to summary judgment the very contentions that party was denied leave to make a part of its pleadings. If the discretion contained in Rule 15 means anything, it means that claims which a party has been denied leave to file may

not be further considered, absent a finding that the District Court was in error in refusing leave to amend.

Even notice pleading requires that the complaint give "fair notice of what plaintiff's claim is and *the grounds upon which it rests*". *Leatherman v. Tarrant County*, 507 U.S. ___, 122 L. Ed. 2d 517, 524 (1993) (emphasis added), quoting *Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 85 (1957). Both the District Court and the Court of Appeals correctly observed that the 21 new charges of malpractice presented entirely new and different grounds for recovery. Pet. at A. 22-23, & A. 8.

Claims not contained in the pleadings are simply not before the Court for consideration. Rule 56 requires that the Court decide whether there are genuine issues of material fact. Rule 56, *F.R.Civ.P.* The only evidentiary dispute which will bar summary judgment is a dispute of material fact; an evidentiary difference as to an immaterial matter will not bar a summary judgment. *Robbins v. Gould*, 278 F.2d 116, 120 (5th Cir. 1960). A material fact is one which is outcome-determinative under prevailing law. *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989). A claim not raised in the pending complaint, but raised only in response to a motion for summary judgment, is not outcome-determinative because it is not properly before the court. *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990).

There are a number of articulated purposes for having a rule providing for motions for summary judgment. Respected commentators have stated that "the rule is intended *to prevent vexation and delay*, improve the machinery of justice, *promote the expeditious disposition of*

cases, and avoid unnecessary trials when no genuine issues of fact have been raised." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, § 2712, pp. 564-567 (emphasis added). These objectives of Rule 56 would be frustrated if a party could endlessly amend pleadings to assert new claims, or if a party could defeat a summary judgment by raising alleged factual disputes outside the scope of the pleadings before the Court.

The District Court constantly accommodated Plaintiff by extending deadlines for disclosure of additional experts and opinions. For example, the Minute Order of December 14, 1989, directed that discovery concerning Plaintiff's experts be completed by March 1, 1990. The Minute Order of March 2, 1990, extended the deadline for depositions of Plaintiff's experts to the end of May, 1990. Plaintiff made late disclosure of the two experts now in dispute, and the District Court again accommodated in Minute Orders of December 14, 1990, and June 28, 1991 by extending the deadline for completion of the depositions of Plaintiff's experts to September 30, 1991. It was only in the depositions of August and September 1991 that Plaintiff first articulated any of the 21 new contentions.

As shown above (this brief, pp. 9-11), the 21 new contentions raised for the first time during the depositions of the experts (who themselves were untimely disclosed under the Court's earlier deadlines), are but the most recent in a long series of baseless charges of malpractice lodged against Defendant hospital. On all previous attempts, Defendant hospital had proved that Plaintiff's contentions of malpractice were manifestly untrue. Even without the additional discovery which

Defendant hospital felt would be necessary on the 21 new charges, the hospital has been able to demonstrate that at least half of the new charges can already be proven to be baseless.

All lawsuits must end sometime. No defendant should be required to face an endless series of claims of malpractice against it. A proper way to put an end to such baseless claims is through the application of Rules 15 and 56, as was done here. In ruling on a Motion for Summary Judgment, the District Court need not consider evidence on contentions which, in the exercise of its discretion, it has denied Plaintiff leave to file. On summary judgment the District Court can properly disregard contentions not contained in the pleadings and raised for the first time in opposition to the Motion for Summary Judgment. No other procedure will bring an end to baseless litigation such as this.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Plaintiff's daughter was hospitalized in the summer of 1982, and former attorneys for Plaintiff procured copies of the hospital chart as soon as she was out of the hospital.

The District Court properly exercised its discretion in denying Plaintiff leave to amend, when Plaintiff sought to assert new and different grounds for recovery at a point in time when discovery of Plaintiff's case was supposed to be ending (not beginning). That motion was made 10 years after the incident in question and 4 years after suit

had been filed, and Plaintiff articulated no reason for this delay.

Plaintiff now claims that the delay was due to defendant hospital, but this argument was not raised before the District Court and should not be considered now. The District Court is in the best position to judge diligence or lack of diligence, and raising the matter this time deprives defendant hospital of the opportunity to present facts to counter that new argument.

In the Petition, as before the Circuit and District Courts, Plaintiff does not assert that there is a genuine issue of material fact on the allegations of malpractice in the Second Amended Complaint. There is simply no dispute on those alleged facts, and summary judgment was properly granted.

After defendant hospital's motion for summary judgment was filed, Plaintiff attempted to raise 21 new contentions of malpractice not contained in the pleadings. When new claims of liability are raised for the first time in response to a motion for summary judgment and are not contained in the pleadings, they need not be considered by the Court. This is especially so where, as here, Plaintiff has properly been denied leave to file the new claims, and the new claims are but the most recent in a long series of fruitless attempts to make out a claim against defendant hospital. Fundamentally, it is too late to start over.

The Respondent, METHODIST MEDICAL CENTER OF ILLINOIS, INC., prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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